LIBRARY
SUPREME COURT. U.S.

Office - Supreme Court, U. S.
FILED
JUN 8 1953
HAROLD B. WILLEY, Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, ~~1952~~ 1953

No. ~~851~~ 109

RALPH G. LEMKE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

BAILEY E. BELL,
213 Central Building, Anchorage, Alaska;
Attorney for Petitioner.

JULIEN A. HURLEY,
Fairbanks, Alaska,
Of Counsel.

Subject Index

	Page
Jurisdiction	2
Federal Rules of Criminal Procedure involved	2
Statement of the case	3
Reasons for granting the writ	4
In dismissing the appeal, the decision of the court below is in conflict with the applicable decisions of this court and of a court of appeals in another circuit on an important question of federal law	4
Conclusion	7

Table of Authorities Cited

Cases	Pages
Berman v. United States, 302 U.S. 212	4
Hill v. Wampoler, 298 U.S. 460	4
Luckenbach S.S. Co. v. United States, 272 U.S. 533	3, 4
Martin v. Clarke, 7 Cir., 105 F. 2d 685, 124 A.L.R. 497	5
Miller v. Aderhold, 228 U.S. 206	4
Porter v. Borden's Dairy Delivery Co., 9 Cir., 156 F. 2d 798	4, 5
Prickett, et al. v. Consolidated Liquidating Corporation, 180 F. 2d 8	5
Richards v. United States, 192 F. 2d 604	4
Shannon v. Retail Clerk's International P. Ass'n, 7 Cir., 128 F. 2d 553	5
Silby v. Foote, 20 How. 290, 61 U.S. 290, 15 L. Ed. 822	4
Wilson v. Southern Ry. Co., 5 Cir., 147 F. 2d 165	5
Woods v. Nichols, 10 Cir., 163 F. 2d 615	4

Statutes	
Alaska Compiled Laws Annotated, 1949, Section 65-5-81	3
Judicial Code, Sections 1254 and 2101 (Act of June 25, 1948, c. 646, Secs. 1254, 2101)	2
62 Stat. 928, 961	2

Rules	
Federal Rules of Criminal Procedure:	
Rule 32(b)	2
Rule 37(b)(2)	2
Rule 52(a)	2, 3, 6

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No.

RALPH G. LEMKE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The above-named petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the

Ninth Circuit, entered in the above entitled cause, dismissing the appeal of petitioner, Ralph G. Lemke, which was entered in said Court of Appeals in Cause No. 13,342, March 31, 1953, and from the order of said Court of Appeals denying petitioner's petition for a rehearing.

JURISDICTION.

The judgment of the Court of Appeals dismissing the appeal of petitioner was entered on the 31st day of March, 1953, and has not yet been reported. A petition for rehearing was denied on the 14th day of May, 1953. Jurisdiction of this Court is invoked under Section 1254 and 2101 of the Judicial Code (Act of June 25, 1948, c. 646, secs. 1254, 2101; 62 Stat. 928, 961; 28 U.S.C. 1254, 2101), and Rule 37(b)(2) of the Federal Rules of Criminal Procedure.

FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED.

Rule 32(b) and Rule 52(a) of the Federal Rules of Criminal Procedure are involved in this case.

STATEMENT OF THE CASE.

Petitioner, Ralph G. Lemke, was convicted of the crime of attempting to obtain money by false pretenses, in violation of Section 65-5-81, Alaska Compiled Laws Annotated, 1949, and was found guilty on the 27th day of February, 1952. On the 10th day of March, 1952, petitioner was sentenced to serve six months in the Federal Jail at Fairbanks, Alaska, the sentence to commence on the 10th day of March, 1952. The certified copy of the entry of sentence was filed in the Court of Appeals together with petitioner's petition for rehearing.

A notice and undertaking of appeal was filed by petitioner in the District Court for the Territory of Alaska, Fourth Division, on the 11th day of March, 1952, but the United States Attorney failed to prepare the formal judgment of conviction until the 14th day of March, 1952, and the appeal was dismissed because the Appellate Court held that the filing of the notice of appeal was premature.

The Circuit Judge Pope dissented from the opinion of the Court and held that for reasons similar to those suggested in *Luckenbach S.S. Co. v. United States*, 272 U.S. 533, that he thought that the Court should hold that the notice of appeal, though premature, was not a nullity, and that he thought that the defect and irregularity was of the sort to be disregarded under said Criminal Rule 52(a). No motion to dismiss the appeal was served or filed by the United States Attorney for the Fourth Division of the Territory of Alaska.

REASONS FOR GRANTING THE WRIT.

IN DISMISSING THE APPEAL, THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT AND OF A COURT OF APPEALS IN ANOTHER CIRCUIT ON AN IMPORTANT QUESTION OF FEDERAL LAW.

In the case of *Richards v. United States,* 192 Fed. 2d p. 604, we quote the Court as follows:

> "We do not need to decide in this case whether, if a defendant takes an appeal immediately after being sentenced but before entry of judgment of conviction, his appeal is effectively taken. We think it proper to note, however, that there is authority for the proposition that his appeal so taken is not a nullity, but becomes fully effective upon subsequent entry of judgment.".

See:

Luckenbach S. S. Co. v. United States, 272 U.S. 533, 535, 47 S. Ct. 186, 71 L. Ed. 394;

Woods v. Nichols, 10 Cir., 163 F. 2d 615;

Porter v. Borden's Dairy Delivery Co., 9 Cir., 156 F. 2d 798.

Compare:

Silsby v. Foote, 20 How. 290, 295, 61 U.S. 290, 15 L. Ed. 822;

Berman v. United States, 302 U.S. 211, 212, 58 S. Ct. 164, 82 L. Ed. 204.

In the case of *Berman v. United States,* 302 U.S., p. 212, the Court makes the following statement:

> "Final judgment in a criminal case means sentence. The sentence is the judgment."

Miller v. Aderhold, 228 U.S. 206, 210;

Hill v. Wampler, 298 U.S. 460, 464.

In the case of *Porter, Administrator, Office of Price Administration v. Borden's Dairy Delivery Company,* 156 F. 2d 798, Ninth Circuit, the Court held:

> "The Notice of Appeal filed March 15, 1946, is from the final judgment entered in this action on January 29, 1946."

On January 29, findings were filed and entered. It was not until the next day, January 30, that judgment was entered. We are of the opinion that since the notice of appeal is addressed to the final judgment that the mistake of a day in the designation of the date of its entry is immaterial and that the appeal is well taken.

Martin v. Clarke, 7 Cir., 105 F. 2d 685, 124 A.L.R. 497;

Shannon v. Retail Clerk's International P. Ass'n., 7 Cir., 128 F. 2d 553,

and

Wilson v. Southern Ry. Co., 5 Cir., 147 F. 2d 165.

In the case of *Prickett, et al. v. Consolidated Liquidating Corporation,* 180 F. 2d p. 8, Ninth Circuit, no final judgment had been entered and the action was still pending in the District Court at the time the case was heard upon appeal, and is the only case cited in the opinion of the Appellate Court in support of the judgment dismissing the appeal.

The judgment and commitment in this case No. 1578-Cr. was not entered until the 14th day of March, 1952, but the notice of appeal filed on the 11th day

of March, 1952, was in Case No. 1578-Cr., and there was only one criminal case No. 1578, so there could be no question in regard to the sentence and judgment from which the appeal was taken.

To deprive the petitioner and defendant in this action of his right to appeal on account of a defect or irregularity and a mistake by his attorney in no way protects any substantial right of the government.

Under said Rule 52(a), all errors, defects, irregularities or variances which do not affect substantial rights should be disregarded and is a restatement of pre-existing law.

It was the contention of petitioner that the indictment in this case failed to state facts sufficient to constitute a crime; that the Court erred in refusing to instruct the jury to return a verdict of not guilty on account of the insufficiency of evidence; and that the Court erred in refusing to give requested instructions to which he was entitled under the law.

It would be a harsh rule indeed to deprive a defendant of his right of appeal and thereby convict him of a crime based upon an indictment which fails to state facts sufficient to constitute a crime.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated, at Anchorage, Alaska, this 29th day of May, 1953.

Respectfully submitted,

BAILEY E. BELL,

Attorney for Petitioner.

JULIEN A. HURLEY,

Of Counsel.